

SEP 30 1996

No. 96-270

**IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995**

**AMCHEM PRODUCTS, INC., ET AL.,
Petitioners,
v.
GEORGE WINDSOR, ET AL.,
*Respondents.***

**ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT**

**MOTION FOR LEAVE TO FILE BRIEF AS
AMICUS CURIAE AND BRIEF OF THE
NATIONAL ASSOCIATION OF MANUFACTURERS
IN SUPPORT OF
PETITION FOR WRIT OF CERTIORARI**

Of Counsel

Arthur R. Miller
Langdell West, Rm.227
Cambridge, MA 02158
(617) 495-4111

Jan S. Amundson
National Association of
Manufacturers
1331 Pennsylvania Ave., N.W.
Washington, DC 20004
(202) 673-3055

Alfred W. Cortese, Jr.
Counsel of Record
Kathleen L. Blaner
Pepper, Hamilton & Scheetz
1300 19th Street, N.W.
Washington, D.C. 20036
(202) 828-1200

*Counsel for Amicus Curiae,
the National Association
of Manufacturers*

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

AMCHEM PRODUCTS, INC., ET AL.,
Petitioners,
v.
GEORGE WINDSOR, ET AL.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

MOTION OF THE
NATIONAL ASSOCIATION OF MANUFACTURERS
FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*

Pursuant to Rule 37.2 of the Rules of this Court, the National Association of Manufacturers moves for leave to file the accompanying brief as *amicus curiae* in support of the petition for a writ of certiorari. The National Association of Manufacturers (NAM) is the nation's oldest and largest broad-based industrial trade association. NAM regularly participates as *amicus curiae* in civil litigation raising issues of national concern to the business community.

The conflict in the circuit courts of appeals about the viability of settlement-only classes under Federal Rule of Civil Procedure 23 is of great concern to manufacturers

across the nation, since many are or have been involved in class action litigation in the federal courts. The manufacturing community urgently needs definitive resolution of the question presented by Petitioners in order to know whether comprehensive class settlements are available to conclusively resolve class action litigation.

Petitioners have consented to the filing of this brief, as have a number of other parties. Consent was denied by some of those who have filed in opposition to the Petition. Therefore, NAM requests leave to file the accompanying brief as *amicus curiae*.

Respectfully submitted,

Of Counsel

Arthur R. Miller
Langdell West, Rm.227
Cambridge, MA 02158
(617) 495-4111

Jan S. Amundson
National Association of
Manufacturers
1331 Pennsylvania Ave., N.W.
Washington, DC 20004
(202) 673-3055

Alfred W. Cortese, Jr.
Counsel of Record
Kathleen L. Blaner
Pepper, Hamilton &
Scheetz
1300 19th Street, N.W.
Washington, D.C. 20036
(202) 828-1200

*Counsel for Amicus Curiae,
the National Association
of Manufacturers*

TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
STATEMENT OF INTEREST	1
SUMMARY OF THE ARGUMENT	2
ARGUMENT	2
1. Product Manufacturers Have A Vital Interest In Prompt Resolution Of The Conflict Between the Circuits Regarding the Standards Applicable To Settlement Classes Under Rule 23.	2
2. The Exceptional Importance Of This Case And The Compelling Need To Settle The Issue Presented Warrant The Grant Of Certiorari By This Court.	5
CONCLUSION	6

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Pages</u>
<i>Castano v. The American Tobacco Co.</i> , 84 F.3d 734 (5th Cir. 1996)	4
<i>Georgine v. AmChem Products, Inc.</i> , 83 F.3d 610 (3rd Cir. 1996)	3
<i>In re A.H. Robins Co.</i> , 880 F.2d 709 (4th Cir.), <i>cert. denied</i> , 493 U.S. 959 (1989)	3
<i>In re Asbestos Litigation</i> , 90 F.3d 963 (5th Cir. 1996)	3
<i>In re Dennis Greenman Sec. Litig.</i> , 829 F.2d 1539 (11th Cir. 1987)	3
<i>In re American Medical Systems</i> , 75 F.3d 1069 (6th Cir. 1996)	4
<i>In re Rhone-Poulenc Rorer, Inc.</i> , 51 F.3d 1293 (7th Cir.), <i>cert. denied</i> , 116 S.Ct. 184 (1995)	4
<i>Malchman v. Davis</i> , 761 F.2d 893 (2d Cir. 1985), <i>cert. denied</i> , 475 U.S. 1143 (1986)	3
<i>Officers for Justice v. Civil Serv. Comm'n</i> , 688 F.2d 615 (9th Cir. 1982), <i>cert. denied</i> , 459 U.S. 1217 (1983)	3

<i>Weinberger v. Kendrick</i> , 698 F.2d 61 (2d Cir. 1982), <i>cert. denied</i> , 464 U.S. 818 (1983)	3
---	---

<i>White v. National Football League</i> , 41 F.3d 402 (8th Cir. 1994), <i>cert. denied</i> , 115 S.Ct. 2569 (1995)	3
---	---

Federal Rules

Federal Rule of Civil Procedure 23	2
1966 Advisory Committee on Civil Rules, Note, <i>reprinted in</i> FEDERAL CIVIL JUDICIAL PROCEDURE AND RULES 96 Pamphlet (West. ed. 1996)	4

**IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995**

AMCHEM PRODUCTS, INC. ET AL.,

Petitioners,

v.

GEORGE WINDSOR, ET AL.,

Respondents.

**AMICUS BRIEF OF THE
NATIONAL ASSOCIATION OF MANUFACTURERS
IN SUPPORT OF
PETITION FOR WRIT OF CERTIORARI**

STATEMENT OF INTEREST

The National Association of Manufacturers (NAM) is the nation's oldest and largest broad-based industrial trade association. Its more than 14,000 member companies and subsidiaries, including approximately 10,000 small manufacturers, are in every state and produce about 85 percent of U.S. manufactured goods. Through its member companies and affiliated associations, the NAM represents every industrial sector and more than 18 million employees.

NAM's members frequently are involved in class action litigation and are vitally interested in resolution of the question presented here. This brief is filed as *Amicus Curiae* in support of the Petition for a Writ of Certiorari.

SUMMARY OF THE ARGUMENT

Amicus supports certiorari to the Third Circuit Court of Appeals to resolve the conflict among the circuit courts of appeals regarding settlement-only classes under Federal Rule of Civil Procedure 23 ("Rule 23"). Whether the Third Circuit's construction of Rule 23 is upheld and the settlement falls, or the majority interpretation of Rule 23 prevails and the settlement stands, a definitive ruling by this Court is of the greatest importance to NAM's members.

ARGUMENT

1. **Product Manufacturers Have A Vital Interest In Prompt Resolution Of The Conflict Between the Circuits Regarding the Standards Applicable To Settlement Classes Under Rule 23.**

The Petition for Certiorari presents the following question for the Court's consideration:

When the parties to a putative class action enter into a settlement, must the district court nevertheless pretend that every legal and factual issue in the case will be contested, and ignore the existence of the settlement, in determining whether class certification is appropriate under Federal Rule of Civil Procedure 23.

In recent years, procedural rules that aggregate claims, including Rule 23, have been the mechanism used to drive some manufacturers into bankruptcy. On occasion, however, in unique and compelling circumstances, Rule 23 settlement-only class actions have afforded litigants the sole means to forge fair and permanent dispositions of mass claims. The interests of many businesses, who are now party to massive litigation concerning products and materials other than asbestos, will be impacted by the Third Circuit's unique interpretation of Rule 23 as to settlement classes.

The Third Circuit held that Rule 23(b)(3) requires a settlement class to satisfy Rule 23 certification criteria as if it were a litigation class. This interpretation is a clear break from long-standing precedent followed in at least five other circuits. Compare *Georgine v. AmChem Products, Inc.*, 83 F.3d 610 (3rd Cir. 1996)(petition for cert. pending) with *In re Asbestos Litigation*, 90 F.3d 963 (5th Cir. 1996); *In re A.H. Robins Co.*, 880 F.2d 709 (4th Cir.), cert. denied, 493 U.S. 959 (1989); *Officers for Justice v. Civil Serv. Comm'n*, 688 F.2d 615 (9th Cir. 1982), cert. denied, 459 U.S. 1217 (1983); *In re Dennis Greenman Sec. Litig.*, 829 F.2d 1539 (11th Cir. 1987); *Malchman v. Davis*, 761 F.2d 893 (2d Cir. 1985), cert. denied, 475 U.S. 1143 (1986); see also *White v. National Football League*, 41 F.3d 402 (8th Cir. 1994), cert. denied, 115 S.Ct. 2569 (1995); *Weinberger v. Kendrick*, 698 F.2d 61 (2d Cir. 1982), cert. denied, 464 U.S. 818 (1983). Nonetheless, the Third Circuit's decision that this case could not be managed as a litigation class is consistent with the trend among the circuits toward more rigorous application of the requirements of Rule 23 for the certification of litigation classes. See, e.g., *Castano v. The American Tobacco Co.*, 84 F.3d 734 (5th Cir. 1996); *In re American Medical Systems*, 75 F.3d 1069 (6th Cir. 1996); *In re Rhone-Poulenc Rorer*,

Inc., 51 F.3d 1293 (7th Cir.), *cert. denied*, 116 S.Ct. 184 (1995) (all refusing to certify mass tort litigation for trial under Rule 23).

Undisturbed, the Third Circuit's decision renders uncertain Rule 23's availability to forge final, comprehensive class settlements -- particularly in mass tort litigation. From an historical perspective, such an interpretation would bring the Rule full circle, back to the original understanding of Rule 23 when it was last amended in 1966. The Advisory Committee Note that accompanied the 1966 amendments expressly stated that Rule 23 was not intended for even single accident mass torts, much less for widely dispersed mass torts such as the case now under review. *See* 1966 Advisory Committee Note, Advisory Committee on Civil Rules, Committee on Rules of Practice and Procedure, U.S. Judicial Conference, *reprinted in* FEDERAL CIVIL JUDICIAL PROCEDURE AND RULES 96 Pamphlet, at 99 (West. ed. 1996).

The Third Circuit's decision was rendered in the midst of consideration of amendments to Rule 23 by the Federal Advisory Committee on Civil Rules. The Rule 23 revisions being considered, in pertinent part, would authorize courts to certify classes for settlement purposes only under conditions that parallel those at issue in the underlying litigation. The proposed amendments are now being circulated for public comment. As a practical matter, the revisions to Rule 23 would not become effective, if at all, until 1999, at the earliest. Thus, the pending revisions to Rule 23 offer little, if any, meaningful guidance or relief to Petitioners, and will not resolve the confusion regarding the validity of Rule 23 settlements in the near future.

2. The Exceptional Importance Of This Case And The Compelling Need To Settle The Issue Presented Warrant The Grant Of Certiorari By This Court.

What the manufacturing community seeks from this Court's review is certainty. Aside from the inconsistent results that conflict produces in similar cases, without certainty and predictability, it is impossible for NAM's members to evaluate, address, and manage their litigation when one circuit forbids what others promote.

This is an extraordinary case. *Amicus* will not repeat the Petitioners' description of the legal rights of the parties or the unprecedented resources at stake in the underlying litigation. We pause only to make one point.

The essence of the class settlement strategy that the litigants adopted was suggested by a blue-ribbon panel that was convened to find an efficient, fair solution to the otherwise intractable asbestos litigation problem. *Report of the Judicial Conference Ad Hoc Committee on Asbestos Litigation*, quoted in *In re Asbestos Prods. Liab. Lit.* (No. VI), 771 F. Supp. 415 (J.P.M.L. 1991). Having done what they were asked to do, the Petitioners naturally expected that they would be given the benefit of the certainty for which they had bargained. Other litigants, such as *Amicus's* members, need to know whether they can reasonably rely upon similar plans and procedures to resolve other intractable and complex litigation.

CONCLUSION

Amicus respectfully prays that the Court grant the Petition for Writ of Certiorari and set this case for briefing and argument to resolve the conflict in the circuits over the interpretation of Rule 23 as applied to settlement-only class actions.

Respectfully submitted,

Of Counsel

Arthur R. Miller
Langdell West, Rm.227
Cambridge, MA 02158
(617) 495-4111

Jan S. Amundson
National Association of
Manufacturers
1331 Pennsylvania Ave., N.W.
Washington, DC 20004
(202) 673-3055

Alfred W. Cortese, Jr.
Counsel of Record
Kathleen L. Blaner
Pepper, Hamilton & Scheetz
1300 19th Street, N.W.
Washington, D.C. 20036
(202) 828-1200

*Counsel for Amicus Curiae,
the National Association
of Manufacturers*